United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ARGUED BY RONALD PODOLSKY, ESQ.

76-6158

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM DAVIS MARTIN,

Plaintiff-Appellant,

-against-

JOHN W. WARNER, Secretary of the Navy and
ADMIRAL D.W.COOPER, Chief of Naval Reserves,
Department of the Navy,

Defendant-Appellees.

B

P/S

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

Plaintiff-Appellart's Brief

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Authorities Cited

Statement of Issues Presented for Review

Does the Secretary of the Navy "acting for the President" have the authority to remove a selectee from the list of Commanders who have beer been appointed to the temporary Rank of Captain by the President by ard with he advice and consent of the Senate, while such candidate is awaiting the date of his assumption of the said rank?

The Court below by Judge Thomas Platt held that the Secretary of the Navy did not have such authority, a conclusion with which the appellant agrees. (A7). *

Does the absence of a signed commission by the President or someone acting on his behalf with authority to execute same signify action on the part of the President tantamount to a removal by him of the candidate for promotion from the list of selectees theretofore approved by him with advice and consent of the Senate, if the President was not informed of or aware of the alleged removal.

The Court below by Judge Thomas Platt held that the absence of such signed commission was tantamout to a removal by the President of the selectee from the list, a conclusion with which appellant disagrees. (A7-8).

*Page references preceeded by "A" refer to pages in the Appendix.

STATEMENT OF THE CASE

The facts of the case are set forth to some degree in the opinion of Judge Thomas Platt at A4-8. The Plaintiff-Appellant is a highly decorated combat pilot (A30) with 21 years, 6 months and 20 days active service in the Naval Reserve (A29). He attained the rank of Commander, USNR and was, pursuant to Title 10, Sec. 5912 USC and Art II, Sec 2 of the United States Constitution selected to be promoted to the rank of Captain, USNR, such selection "shall be made by the President, by and with the advice and consent of the Senate."(A5). While on said list for appointment to the temporary rank of Captain, USNR, plaintiff-appellant is alleged to have"streaked" through the Belmort Hotel Ballroom in New York City in the presence of a gathering of members of the Association, and their ladies all of whom were in civilian clothes at a Reserve Officers Association dance at the hotel. ("Streaking" is defined as running incognito in phantomlike fashion, nude before a gathering of onlookers in order to provide levity to the proceedings.) The incident is alleged to have taken place May 3, 1974. On June 28, 1974 the Secretary of the Navy "approved" a request of Bureau of Personel "that the Chief of Naval Personnel be authorized to take no action with regard to the temporary promotion of the plaintiff to Captain pending resolution of his alleged misconduct" as authorized by 10 USC 5902d

as amended (A6). On July 1, 1974, plaintiff's "running mates" on the Captains's list assmued the rank of Captain, USNR, but defendants claimed that the plaintiff did not. (A6) On November 12, 1974, the Secretary of the Navy "approved" a memorandum for him from the Bureau of Naval Personnel recommending that he,"acting for the President" remove plaintiff's name from the promotion list.(A6, 18, 19). By the Secretary's approval of such memorandum, defendant-appellees maintain that the president memoved plaintiff's name from the promotion list in accordance with title 10 USC 5905(a).(A7, 35, 18-19).

Additional facts determined from interrogatories and other documents indicated that:

The President was not personally advised of the Secretary's action effectingthe plaintiff's removal from the list(A22); that the President was not personally notified of the incident by officials of the Department of the Navy (A22); thatthePresident of the United States did not provide any imput into the determination to remove the plaintiff from the list (A27); that the Secretary of the Navy signed all commissions "BY THE PRESIDENT" (A31-33).

The Court below concluded that the Secretary of the Navy had no authority to remove the Plaintiff-Appellant from the list, but concluded that since plaintiff-appellant's commission had not issued or been signed, this was tantamount

to an affirmative removal of him by the President from the list. (A7-8).

By its opinion, the Court below denied plaintiff's motion for summary judgment and grarted defendant's motion for summary judgment dismissing the complaint and judgment was entered thereon.(A3-8). Preliminary procedures seeking to stay the Navy from conducting an investigation into the incident were had herein and are not substantively involved in this appeal, and are reported at 377 F. Supp. 1039, aff'd without opinion in this Court. (Document 13 Record on appeal).

POINT I: PLAINTIFF-APPELLANT WAS NOT REMOVED FROM THE PROMOTION LIST AND ASSUMED THE RANK OF CAPTAIN, USNR AT THE CONCLUSION OF ANY VALID DELAY IN PROMOTION.

It is agreed by all parties that the plaintiff-appellant was approved for promotion to the rank of CAPTAIN, USNR pursuant to Title 10, USC 5912 and Art II Sec. 2, U.S. Constitution (A5,21A34). On June 28, 1974 the Secretary "approved" a request of the Bureau of Naval Personnel that it be authorized to take no action with regard to the temporary promotion of the plaintiff to captain pending resolution of his alleged misconduct of May 3, 1974, pursuant to 10 USC 5902(d).(A6) The promotion was thus delayed pending the conclusion of the investigation. The investigation was finished July 10, 1974 (A18 par 1.) Had he not been delayed, his date of promotion would have been July 1, 1974. (A23-24, A6). On November 12, 1974 the Secretary of the Navy approved a memorandum that he, 'acting for the President", remove Plaintiff-Appellant's name from the promotion list. By this action. Defendart-Appellee contended that Plaintiff-Appellant was removed from the list and thereby deprived the Captaincy. Plaintiff-Appellant contended that he was not validly vemoved from the list and assumed the rank when the investigation or valid delay was over.(A16)

A motion for summary judgment was made and denied. the Cross motion for summary judmgment dismissing the complaint was granted. (A4-8).

The Court below correctly concluded that the Secretary of the Navy had no power or authority to remove plaintiff-appellant's name from the list pursuant to Title 10 USC 5905(a)(A7) The Secretary, observed the Court,only appears to have the power to delay the promotior of an officer who is under investigation under 10 USC 5902(d).(A7). Not only is there a clear delimitation of powers between that of the Secretary to delay and the President to removal in the same chapter of law, but the delay accorded the Secretary under the statute is severely limited in time and scope to (1) an officer who is under investigation and(2)"until the investigation or proceedings are completed. However the promotion of an officer may not be delayed under this subsection for more than one year after the date he is selected for promotion unless the Secretary determins that a further delay is necessary in the public interest. (Emphasis supplied.)

The investigation of Plaintiff-Appellant was concluded July 10, 1974 (A18 par 1.). Thus the delay of promotion took place by memorandum dated June 28, 1974 under 10 USC 5902(d) and could only have lasted until July 10, 1974, the date the investigation was completed. As of that date, the investigation was completed, and unless the President removed him from the list, the delay in his promotion ended and he assumed the rank of Captain, USNF, of which he is now being deprived

It should be noted that 10 USC 5912 provides that permanent and temporary appointment of officers above the rank of Lieutenant Commander in the Naval Reserve shall be made by the President, by and with the advice and consent of the Senate. Appointment to lower ranks were to be made by the President alone. The formality of selection of this Plaintiff-Appellant thus laid out in statute was consistent to Art II Sec. 2, Cl. 2 of the U.S. Constitution which reads "He shall have Power*** and by and with the Advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of the Departments." (Emphasis supplied.)

Congress thus VESTED in the President alone power to appoint below the rank of Lieutenant Commander but reserved the Senate Consent requirements with respect to ranks above. When it came to removal, it VESTED the power of removal in the President alone and not in the Head of the Department 10 USC 5905(a) and limited the Head of the Department in this appointment procedure to a severely limited delay under 10 USC 5902(d). These

clear and unequivocal constitutional and statutory declarations need no interpretation and clearly support the conclusion of the court below that the alleged removal by the Secretary of the Navy was illegal and without authority.

If the Secretary's power was that of delay and delay only during the period of investigation, and the investigation concluded July 10, 1974, why then was not Plaintiff-Appellant entitled to assume the rank of Captain, USNR? Defendant-Appellees attribute this non-assumption of rank to the Secretary's alleged removal of Nov. 12, 1974 (A18-19)(A20),(A35). Since such removal was illegal as aforesaid, and since his delay could only be effective during the period of investigation "not to exceed one year" under 10 USC 5902(d),when the investigation ceased,the delay ceased;and not having been removed validly by the President under 10 USC5905(a) he by law assumed the rank of Captain, USNR.

The Court below observed that Plaintiff-Appellant's position that he was not validly removed from the list was correct, but then went on to observe that since the Commission was not signed by the President or someone acting for him, this is tantamount to an affirmative removal by the President of the Plaintiff-Appellant. (A7-8). The Court indicated that the President's failure to prepare and sign the commission was equivalent of, or tantamount to, an affirmative removal by him of the plaintiff's name from the promotion list under 10 USC 5905(a).

In light of the appointment requirements of 10 USC 5912 and Art. II Sec. 2 Cl 2 U.S Constitution and the fact that a President "may" remove the name of any reserve officer from a promotion list under 10 USC 5905(a), it is clear that an affirmative determination by the President be made to remove. The word "may" involves discretion. Unlike "shall" or "must" it involves more than a ministerial act. It involve responsible deliberation and responsible determination by the President.

In the Affidavit of Smith in opposition to plaintiff's motion forsummary judgment (A31-33) it is contended that the Secretary has supplanted the President in the Appointment of Naval Officers and the Preparation and Signing of the Commissions. This usurpation should not be approved as the basis for holding that the President affirmatively removed Plaintiff-Appellant from the list by his failure to prepare and sign the commission. Congress did not VEST under Art II Sec. 2 Cl 2 either the appointment power under 10 USC 5912 nor the removal power under 10 USC 5905(a) in the Head of the Department. As the Secretary of the Navy had no authority to remove Appellant from the list, his action of November 12, 1974 (A18-19) is and remains a nullity. The decision to remove is clearly a Presidential decision.

Nor could it be successfully contended by Defendant-Appellees that the Secretary has implied delegation of Presidential Power in this regard. Although a Head of a Department has implied power to act for the President in such matters as whether or not certain lands should be sold, prices should be raised or otherwise controlled or other decisions conferred upon the President by statute, such delegation does not apply to the question of appointment. The appointment or question as to who shall or shall not be promoted falls within the vesting provision of Art II Sec. 2 Cl. 2 of the U.S. Constitution. Appointment to the rank in question is left to the President with advice and consent of the Senate under 10 USC 5912. Removal from the list power is vested, not in the Head of the Department but in the President, under 10 USC 5905(a). The Head of the Department was only vested with the power of delay, but only during the limited period of the investigation. Hence, when it comes to the Appointment Power, implied delegation is not warranted and the Court below correctly recognized this point. (47-8).

Moreover, coupled with the Appointment Power discussion is the fact that the President is Commander in Chief of the Armed Forces under Art. II Sec. 2 of the U.S. Constitution. Promotion is a command function and is added weight in this case

against implied delegation. The duty of the President as Commander in Chief is a non-delegable one.

All the matters contained herein establishes the wisdom of the separation of powers between the President to remove and the Secretary to delay. The Secretary delays to conduct the investigation. Presumably when the investigation is over he reports to the President who "may" remove or not remove, as the President, in his own discretion, shall decide. Surely the Secretary does not report the result of the investigation to himself and then make a purely Presidential decision. And the decision is clearly Presidential in nature, vested solely in the President by the Constitution and the statutes.

The statutes discussed are consistent with the true intent of the Founding Fathers. It is unfortunate, but the concept of merit promotion inherently means competition. Those lower on a list are being delayed by those higher on the list. The opportunity to have a friend lower on a list advanced at the expense of another by his resignation, retirement, death or disciplinary problems may sometimes cause high officials to do favors for that friend by influencing in an unfair war those still higher officials to take action to achieve the friend's advancement. That is why certain decisions are Presidential and to be made by the President alone and not delegated to a Head of a Department. A President is not easily

reached; his decisions are looked upon as important and he gives a good deal more thought to them as he is responsible for them. There is an exciting passage discussing the dangers of decision by committee or cabal caused by diffusion of responsibility for decision by reposing it in more than one man to be found in, Federalist, No. 77 (Alexander Hamilton) Modern Library, New York, N.Y. p. 500, portions of which are annexed hereto. Suffice it to say that one line merits particular attention. "Every mere council of appointment, however constituted, will be a conclave, in which cabal and intrigue will have their full scope."

By vesting in the President the power to remove as an attendant power to that of appointment, Congress intended that power to be a Presidential decision. It is not a diffused power. The President is Commander in Chief by virtue of Constitutional Mandate. The Federalist, No. 74 (Hamilton) op. cit. p. 481-483 discusses the Commander in Chief provision. "The propriety of this provision is so evident in itself, and is, at the same time so consonent to the precedents of the State Constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction

of war most pecularily demands those qualities which distinguish the exercise of power by a single hand***."

As the Parties all agree that the Plaintiff-Appellant was on the list by virtue of the selection of him by the President with Advice and Corsent of the Senate, and the parties all agree that the President was neither informed of the incident (A22), informed of the alleged removal of Plaintiff from the list by the Secretary A22, nor did he, the President, provide any imput whatsoever into the determinatior to remove him from the list. (A27). Thus there was a Presidential Determination, concurred in by the Senate that Plaintiff-Appellant be promoted, but no such determination of Presidential calibre that he be removed.

The Court below concluded that since the trapping of the signed commission was not prepared and delivered, this somehow trarslated into an affirmative removal by the President of the Plaintiff-Appellart. Since the alleged operative act of removal was the Secretary's illegal action of Nov. 12, 1974, and no subsequent affirmative action by the President to effect a removal took place, it is this illegal act which is being made he legal basis of depriving Plaintiff-Appellant of his Captaincy. Plaintiff-Appellant became a Captain July 10, 1974 when he was no longer under investigation, as his delay by the Secretary could only last during the period of the investigation under 10 USC 5902(d).

Since it has been demonstrated by the affidavit of Smith at A31-33 that it is the Secretary who oversees and prepares the commission and signs it, and since it has been demonstrated that the Secretary has no power to remove Plaintiff-Appellant from the list, the refusal of the Secretary to prepare and sign the Commission cannot be considered a Presidential refusal without Presidential imput or knowledge of the act. In Marbury v Madison, 5 US 137 there was Presidential knowledge and refusal to prepare and sign and deliver the commission involved. In D'Arco v U.S., 194 Ct. Cl. 811, 816 (1971) the Constitutional issues were not presented as herein. "Failure"on the part of the President to complete the appointment by "failing" to prepare or sign the commissior must be read in conjunction with the word "may" remove of 10 USC 5905(a). The word "may" means a conscious decision of Presidential calibre. Where, as here, the President has been conclusively shown to have had no imput whatsoever irto the determination, the determination is not Presidential as Congressional intent requires. Plaintiff Appellant has assumed the rank of Captain as of July 10, 1974 since he was not under investigation after that date and hence could not be legally delayed in his promotion and has not been legally removed by the President as required by statute.

In light of all this, it may be asked, What can and should this Court do? It cannot direct the President to prepare and deliver to Plaintiff-Appellant the commission document. It can, and by right ought to declare that Plaintiff'Appellant assumed the rank of Captain, USNR, as of July 10, 1974, the date of the conclusion of the investigation, having been theretofore selected for promotion and theretofore delayed only during the period of investigation. It can and by right ought to direct entry of judgment for the civil damages as requested in the complaint. (All). It can "invite" the President to see to it that the commission is prepared and delivered, but can hold that even in the absence of such delivery of the trapping of office, Plaintiff-Appellant, forced to retire as Commander July 1, 1975, in reality retired as a Captain, USNR. (A19 per.4). If the President thereafter wishes to exercise such power as he may have either to remove or demote Plaintiff-Appellant or attempt to deprive him of his Captain's pension, assuming there is jurisdiction at this point to deprive him of a vested pension, he is free to do so. He has not affirmatively exercised such presidential power to date and no legal fiction can overcome this fact.

CONCLUSION: JUDGMENT BELOW SHOULD BE REVERSED AND JUDGMENT ENTERED IN FAVOR OF PLAINTIFF-APPELLANT DECLARING HIM TO HAVE ASSUMED THE RANK OF CAPTAIN, USNR, WITH RETROACTIVE BENEFITS AS REQUESTED IN THE COMPLAINT.

Respectfully Submitted,

RONALD PODOLSKY

SECTIONS OF LAW INVOLVED

U.S. CONTITUTION ART II Sec. 2 Cl 2.

ARTICLE II

***

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

TITLE 10 USC:

Sec. 5912: Permanent and temporary appointments under this chapter in grades above lieutenant-commander in the Naval Reserve and in grades above major in the Marine Corps Reserve shall be made by the President, by and with the advice and consent of the Senate. All other permanent and temporary appointments under this chapter shall be made by the President alone.

Sec 5905(a) The President may remove the name of any reserve officer from a promotion list established under this chapter.

Sec. 5902(d) The promotion of an officer of the Naval Reserve or the Marine Corps Reserve who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed by the Secretary of the Navy until the investigation or proceedings are completed. However, the promotion of an officer may not be delayed under this subsection for more than one year after the date he is selected for promotion unless the Secretary determins that a further delay is necessary in the public interest.

to what objects? The power of influencing a person, in the sense in which it is here used, must imply a power of conferring a benefit upon him. How could the Senate confer a benefit upon the President by the manner of employing their right of negative upon his nominations? If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct, I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The POWER which can *originate* the disposition of honors and emoluments, is more likely to attract than to be attracted by the POWER which can merely obstruct their course. If by influencing the President be meant *restraining* him, this is precisely what must have been intended. And it has been shown that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate. The right of nomination would produce all the good of that of appointment, and would in a great measure avoid its evils.

Upon a comparison of the plan for the appointment of the officers of the proposed government with that which is established by the constitution of this State, a decided preference must be given to the former. In that plan the power of nomination is unequivocally vested in the Executive. And as there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature, the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive. If an ill appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium and disgrace.

The reverse of all this characterizes the manner of appointment in this State. The council of appointment consists of from three to five persons, of whom the governor is always one. This small body, shut up in a private apartment, impenetrable to the public eye, proceed to the execution of the trust committed to them. It is known that the governor claims the right of nomination, upon the strength of some ambiguous expressions in the constitution: but it is not known to what extent, or in what manner he exercises it; nor upon what occasions he is contradicted or opposed. The censure of a bad appointment, on account of the uncertainty of its author, and for want of a determinate object, has neither poignancy nor duration. And while an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost. The most that the public can know, is that the governor claims the right of nomination; that *two* out of the inconsiderable number of *four* men can too often be managed without much difficulty; that if some of the members of a particular council should happen to be of an uncomplying character, it is frequently not impossible to get rid of their opposition by regulating the times of meeting in such a manner as to render their attendance inconvenient; and that from whatever cause it may proceed, a great number of very improper appointments are from time to time made. Whether a governor of this State avails himself of the ascendant he must necessarily have, in this delicate and important part of the administration, to prefer to offices men who are best qualified for them, or whether he prostitutes that advantage to the advancement of persons whose chief merit is their implicit devotion to his will, and to the support of a despicable and dangerous system of personal influence, are questions which, un-

fortunately for the community, can only be the subjects of speculation and conjecture.

Every mere council of appointment, however constituted, will be a conclave, in which cabal and intrigue will have their full scope. Their number, without an unwarrantable increase of expense, cannot be large enough to preclude a facility of combination. And as each member will have his friends and connections to provide for, the desire of mutual gratification will beget a scandalous bartering of votes and bargaining for places. The private attachments of one man might easily be satisfied; but to satisfy the private attachments of a dozen, or of twenty men, would occasion a monopoly of all the principal employments of the government in a few families, and would lead more directly to an aristocracy or an oligarchy than any measure that could be contrived. If, to avoid an accumulation of offices, there was to be a frequent change in the persons who were to compose the council, this would involve the mischiefs of a mutable administration in their full extent. Such a council would also be more liable to executive influence than the Senate, because they would be fewer in number, and would act less immediately under the public inspection. Such a council, in fine, as a substitute for the plan of the convention, would be productive of an increase of expense, a multiplication of the evils which spring from favoritism and intrigue in the distribution of public honors, a decrease of stability in the administration of the government, and a diminution of the security against an undue influence of the Executive. And yet such a council has been warmly contended for as an essential amendment in the proposed Constitution.

I could not with propriety conclude my observations on the subject of appointments without taking notice of a scheme for which there have appeared some, though but few, advocates; I mean that of uniting the House of Representatives in the power of making them. I shall, however, do little more than mention it, as I cannot

imagine that it is likely to gain the countenance of any considerable part of the community. A body so fluctuating and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned. The example of most of the States in their local constitutions encourages us to reprobate the idea.

The only remaining powers of the Executive are comprehended in giving information to Congress of the state of the Union; in recommending to their consideration such measures as he shall judge expedient; in convening them, or either branch, upon extraordinary occasions; in adjourning them when they cannot themselves agree upon the time of adjournment; in receiving ambassadors and other public ministers; in faithfully executing the laws; and in commissioning all the officers of the United States.

Except some cavils about the power of convening *either* house of the legislature, and that of receiving ambassadors, no objection has been made to this class of authorities; nor could they possibly admit of any. It required, indeed, an insatiable avidity for censure to invent exceptions to the parts which have been excepted to. In regard to the power of convening either house of the legislature, I shall barely remark, that in respect to the Senate at least, we can readily discover a good reason for it. As this body has a concurrent power with the Executive in the article of treaties, it might often be necessary to call it together with a view to this object, when it would be unnecessary and improper to convene the House of Representatives. As to the reception of ambassadors, what I have said in a former paper will furnish a sufficient answer.

We have now completed a survey of the structure and

STATE OF NEW YORK
COUNTY OF NEW YORK:ss

RONALD PODOLSKY being duly sworn deposes and says that he resides at 400 E. 20th St. New York, N.Y. That on November 30, 1976 he served three copies of the within brief upon DAVID TRAGER, ESQ. attorney for the defendant appellees by depositing them securely wrapped and with adequate postage within a depository of the U.S. Postal Service located at 15 Park Row, New York, N.Y. and addressed to said attorney at 225 Cadman Plaza East, Brooklyn, NY.

Ronald Podolsky

Sworn to before me
November 30, 1976.

Irving Kornblum

IRVING KORNBLUM
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4730559
Qualified in New York County
Commission Expires March 30, 1978